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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-671

CECILIA ESPINOZA and RUDOLFO ESPINOZA,
Petitioners,

vs.

FARAH MANUFACTURING COMPANY, INC.,
Respondent.

ON THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

This Brief is filed in response to Petition for Writ of Certiorari by Petitioners, Cecilia Espinoza and Rudolfo Espinoza. Respondent, Farah Manufacturing Company, Inc., respectfully prays that writ be denied.

OPINIONS BELOW

The District Court opinion is reported at 343 F.Supp. 1205 and the Court of Appeals opinion at 462 F.2d 1331. Both appear in the Appendix of the Petition.

JURISDICTION

The jurisdictional requisites are adequately stated in the Petition.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (the "Act") and of Equal Employment Opportunity Commission Regulation, 29 C.F.R. § 1606.1(d) (1972) appear in the Petition at pages 2-3.

QUESTION PRESENTED

Whether Farah violated Section 703(a) of the Act by refusing to consider Espinoza for employment because she is not a United States citizen when more than 97% of Farah's employees in the position sought by Espinoza are of her Mexican national origin, as was the person hired in her stead.

STATEMENT

Espinoza, a resident alien whose national origin is Mexico, was denied consideration for employment by Farah pursuant to a long-standing employment policy which requires Farah employees to be United States citizens. Espinoza filed a charge with the Equal Employment Opportunity Commission (EEOC), alleging that Farah had

discriminated against her on the basis of national origin in violation of Section 703(a) of the Act. The Regional Director of the EEOC issued his Finding of Fact which included determinations that: (1) Espinoza believed that the persons hired in her stead were Spanish surnamed United States citizens; (2) Espinoza's sister-in-law, a Spanish surnamed citizen was employed by Farah; (3) Farah's San Antonio plant employs about 625 persons, 95% of whom are Spanish surnamed Americans; and (4) "The evidence in the record does not establish that . . . [Farah] refused to employ . . . [Espinoza] because she is Spanish surnamed."[1]

Upon issuance by the EEOC of a Notice of Right to Sue (29 C.F.R. § 1601.25b(d)) Espinoza brought suit. The District Court granted her Motion for Summary Judgment, holding that Farah had discriminated against her on the basis of national origin in violation of Section 703(a) of the Act.

The Court of Appeals reversed, finding that Espinoza was "denied an opportunity for employment because she lacks United States citizenship, and for no other reason." 462 F.2d at 1333; Petitioners' Appendix 3a. The Court held that "Neither the language of the Act, nor its history, nor the specific facts of this case persuade us that such a refusal has been condemned by Congress." 462 F.2d at 1333-34; Petitioners' Appendix 5a.

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1. Appendix in Fifth Circuit 21-22. Although not included in the final form of his Finding of Fact, the earlier draft of "Regional Director's Finding of Fact," (Supplemental Appendix in Fifth Circuit 34) correctly sets forth the controlling issue and what Farah believes to be the correct disposition thereof:

"11. I find that the issue in this case is 'citizenship' and not national origin.

"12. I find no evidence in the record which indicates that [Farah] did not hire [Plaintiff] because of her national origin."

REASONS FOR DENYING WRIT

Farah wholeheartedly agrees with Representative Celler (D., N.Y.), author of an amendment which became a subsection of Title VII of the Act, who said, "[T]he court . . . cannot find any violation of the Act which is based on facts other—and I emphasize 'other'—than discrimination on the grounds of race, color, religion, [sex] or national origin."[2] The Fifth Circuit Court of Appeals apparently agrees, having correctly pointed out that Section 703 of the Act "does not prohibit discrimination on any classification except those named in the Act itself. Therefore, once the employer has proved that he does not discriminate against the protected groups, he is free thereafter to operate his business as he determines, hiring and dismissing other groups for any reason he desires." *Phillips* v. *Martin Marietta Corp.*, 411 F.2d 1, 4 (5th Cir. 1969), *rev'd on other grounds*, 400 U.S. 542 (1971). When more than 97% of Farah's employees in a position sought by Espinoza are of her Mexican national origin, it is clear that she was not discriminated against on the basis of her national origin. Therefore, Farah has not violated the Act, and review by this Court on certiorari is unwarranted.

The Court of Appeals decision was correct on the facts, the clear and unmistakable language of the Act, and its legislative history. Furthermore, the decision is consistent with United States government hiring policy which denies employment to aliens and with state fair employment practices legislation. In *this case*, there simply is no discrimination on the basis of national origin.

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2. 110 Cong. Rec. 2567 (1964). Remarks by Rep. Celler, author of an amendment which became § 2000e-2(g).

I.

The decision below is correct.

A. The Court of Appeals decision is correct on the facts and is consistent with Phillips v. Martin Marietta Corp.

The facts show overwhelmingly that Farah did not discriminate against Cecilia Espinoza on the basis of her Mexican national origin. The uncontroverted affidavit[3] of Farah's corporate secretary, Pedro Villaverde, whose national origin is Mexico, indicates that at the time of the alleged violation in this case:

(1) 92.5% of Farah's employees were of Mexican national origin,

(2) 96.3% of the work force at the San Antonio plant was of Mexican national origin, and

(3) 98.5% of the individuals employed in the position sought by Espinoza were of Mexican national origin. Appendix in the Fifth Circuit 29-30.

Espinoza does not allege that she was discriminated against on the basis of her national origin. The EEOC Regional Director found that Farah did not refuse to consider Espinoza because she is Spanish surnamed.[4] Even the District Court acknowledged that the evidence negates "discrimination on the basis of ancestry or ethnic background." 343 F.Supp. at 1206; Petitioners' Appendix 11a. Finally, the Court of Appeals found that "Espinoza was not denied a job because of her Spanish surname, her Mexican heritage, her foreign ancestry, her own or her parents'

3. Appendix in Fifth Circuit 29-30.

4. Appendix in Fifth Circuit 21-22.

birthplace . . . [but] because she had not acquired United States citizenship." 462 F.2d at 1333; Petitioners' Appendix 5a. Farah does not disagree with this overwhelming concensus of opinion.

In the proper factual setting, Farah would not even quarrel with the basic thrust of EEOC guideline which provides:

> Because discrimination on the basis of citizenship has the effect of discriminating on the basis of national origin, a lawfully immigrated alien who is domiciled or residing in this country may not be discriminated against on the basis of his citizenship. . . . 29 C.F.R. §1606.1(d) (1972).

Admittedly, a preference for United States citizens *could* be used to discriminate on the basis of national origin, but that is not the case here. As applied *to the facts of this case*, the EEOC guideline is inapposite.

Prior to its publication the EEOC agreed with Farah. The Regional Director in an early draft of his Finding of Fact correctly observed that "the issue in this case is 'citizenship' and not national origin."[5] In 1967 the EEOC General Counsel held that discrimination against nonresident aliens did not constitute discrimination based on national origin. EEOC General Counsel's Opinion, 1 CCH Employment Prac. Guide ¶ 1220.20 (1967). That Farah's preference for United States citizens affects both resident and nonresident aliens does not alter the correctness of the General Counsel's opinion. Neither does the subsequent publication of the EEOC guideline. The uncontradicted facts *of this case* remain unchanged; Farah has not used its long-standing citizenship requirement in any way which has

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5. See note 1 *supra*.

resulted in discrimination against Espinoza because of her Mexican national origin.

Phillips v. *Martin Marietta Corp.*, 400 U.S. 542 (1971), does not require a different result. Mindful of its holding that "sex-plus" discrimination is illegal, Espinoza categorizes Farah's preference for citizens as "national origin-plus" discrimination—apparently on the theory that the tacking of the word "plus" will turn the trick. The turning of a phrase, however, is not a viable substitute for analysis of *Phillips vis-a-vis* the facts at hand. In *Phillips* the employer refused to hire women with pre-school age children. When challenged by Mrs. Phillips, the employer argued that it was not guilty of sex discrimination on the theory that 75% to 80% of its employees were women; therefore, there could be no discrimination against women. The court disagreed. There was sex discrimination because men with pre-school age children were hired, but not women with pre-school age children. At first blush, it might seem that Farah is taking the same position as Martin Marietta: Farah did not discriminate against Espinoza, because more than 90% of Farah's employees share Espinoza's national origin. There is a crucial difference, however. In *Phillips* the job applicant was a woman with pre-school age children; no women with young children were employed, but men were. The result was sex discrimination. In the instant case, Espinoza is of Mexican national origin, but more than 90% of Farah's employees are of Mexican national origin. Espinoza has been discriminated against not because of her Mexican national origin (a prohibited basis of discrimination), but because of her citizenship (a basis of discrimination not prohibited by Congress). Turning a neat phrase—"national origin-plus"—does not change that.

It is abundantly clear—in fact, no one from Espinoza through the Court of Appeals has taken a contrary position —that Espinoza was not denied employment because of her Mexican national origin. *Phillips* does not require a different result. Therefore, the Court of Appeals decision is correct and the granting of a writ by this Court is unwarranted.

B. The Court of Appeals decision correctly interprets the clear and unambiguous language of the Act and its legislative history.

It simply will not do for Espinoza to argue that the Act *should* prevent employers from preferring United States citizens in hiring. The question is not whether it *should* have but whether Congress did prevent employment preference for citizens. Nor will it do to argue that the Court of Appeals decision "undermines the goals of the Statute." That begs the question. What are the goals of the statute?

Proper statutory construction begins with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used. *Richards* v. *United States*, 369 U.S. 1 (1962). It is difficult to perceive of any more precise language than "national origin." The only direct definition of "national origin" in the Act's legislative history comes with unmistakable clarity from Congressman Roosevelt, Chairman of the House Subcommittee which reported the bill.

> May I just make very clear that "national origin" means national. It means the country from which you or your forebears came from. You may come from Poland, Czechoslovakia, England, France, or any other country. 110 Cong. Rec. 2548-49 (1964).

The Minority Report on Title VII apparently reflects the same understanding of the term "national origin."

> There is no material change in the substantive provisions of this title and its predecessor title defining "unlawful employment practices" hence the general coverage of both provisions is the same. In defining the basis of discrimination, the subcommittee proposal contained the words "to discriminate against any individual because of his race, color, religion, national origin, or *ancestry*." The pending bill omits the words "or ancestry." 2 U.S. Code Cong. & Ad. News 2445 (1964).

The Minority Report obviously felt that "national origin" and "ancestry" were synonymous. The use of both terms was clearly redundant, and deletion of "ancestry" did not change the provision's general coverage. Wishful thinking will simply not render the term "national origin" synonymous with "citizenship." As Senator Humphrey commented, Section 703(h) of Title VII "makes clear that it is only discrimination on account of race, color, religion, sex, or national origin that is forbidden by that title." 110 Cong. Rec. 12721-25 (1964).

There is no question that Congress could prohibit discrimination on the basis of citizenship or any other basis, but it has not yet done so. Although there is no need to resort to legislative history when, as here, the language of the statute is clear and unmistakable, the legislative history in all respects reinforces Farah's position that "national origin" does not mean "citizenship." The Court of Appeals decision is therefore correct.

C. The Court of Appeals decision is consistent with the federal government's employment policy which prohibits discrimination on the basis of national origin while limiting employment to United States citizens and with state fair employment practices legislation which prohibits national origin discrimination but sanctions private employer preference for United States citizens.

Since 1914 Civil Service Commission Regulations have limited the right to enter competitive examination for employment by the government to United States citizens. Executive Order No. 1997 (1914); see 5 C.F.R. § 338.101 (1972). Yet, since 1943, national origin discrimination in federal government employment has been prohibited.[6] A former proviso to Section 701(b)[7] of Title VII of the Act stated:

> . . . That it shall be the policy of the United States to insure equal employment opportunities for Federal employees without discrimination because of race, color, religion, sex, or national origin and the President shall utilize his existing authority to effectuate this policy.

In the course of reorganizing some United States statutes, the above proviso was repealed and re-enacted without material change as 5 U.S.C. § 7151. Furthermore, the Treasury, Postal Service, and General Government Appropriation Act, 1973 includes a provision that unless otherwise specified "no part of any appropriation *contained in this*

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6. Exec. Order No. 9346 (1943) issued by President Roosevelt; Exec. Order No. 10308 (1951) by President Truman; Exec. Order No. 10479 (1953) by President Eisenhower; Exec. Order No. 10925 (1961) by President Kennedy; Exec. Order No. 10246 (1965) by President Johnson; and Exec. Order No. 11478 (1969) by President Nixon.

7. Civil Rights Act of 1964, Title VII, § 701(b), 78 Stat. 253 (1964).

or any other Act shall be used to pay compensation of any officer or employee of Government of the United States . . . unless such person is a citizen of the United States. . . ."[8] Thus, it is readily apparent that the very legislative body which forbade discrimination in employment, both private and public, on the basis of national origin also imposes the citizenship requirement as a condition to employment by the federal government. Farah is doing no more than following the example set by the federal government, that is, interpreting its prohibition against national origin as being consistent with a citizenship prerequisite for hiring.

Wong v. *Hampton*, 333 F.Supp. 527 (N.D. Cal. 1971), is in point. Five resident Chinese aliens, two of whom had declared an intention to become United States citizens, filed suit against the Civil Service Commission when it denied them the opportunity to participate in competitive examinations. The plaintiffs contended that the Commission regulation allowing only United States citizens to take the examination violated Executive Order 11478 which prohibits national origin discrimination in federal government hiring and employment. The District Court disagreed. It interpreted Executive Order 11478 to mean that "*as between United States citizens* no distinction should be made on the basis of their respective national origins." (333 F.Supp. at 530; emphasis, the court's.) This, of course, is a logical result when a court is faced with an Executive Order prohibiting discrimination on the basis of national origin coupled with an even older government policy of restricting federal employment to United States citizens. The conclusion is inescapable that "national origin" and "citizenship" are not synonymous.

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8. § 602 P.L. 92-351; 86 Stat. 471 (1972). (Emphasis added.)

Espinoza argues, however, that Farah's position is inconsistent with federal immigration policy, which is apparently concerned with the employability of aliens—so long as their employer is not the federal government. This argument is more appropriately addressed to Congress. The truth of the matter is that if "national origin" and "citizenship" are deemed to be synonymous, as Espinoza argues, the federal government will be obliged to abandon its citizenship requirement.

Furthermore, state fair employment practices legislation, which originated in New York in 1945, is consistent with Farah's position that a preference for United States citizens is not per se discrimination on the basis of national origin. By the time of the passage of the 1964 Civil Rights Act some twenty-eight states had fair employment practices legislation.[9] New York, and virtually all other states, had included "national origin" and/or "national ancestry" among the prohibited grounds of discrimination. Nevertheless, "national origin" is not interpreted to encompass "citizenship." To the contrary, many states had followed New York's lead in holding expressly that an employer's continued imposition of a requirement of United States citizenship as a precondition for employment was not inconsistent with the state's ban on discrimination on the basis of national origin.[10] Finally,

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9. EEOC, Legislative History of Titles VII and XI of the Civil Rights Act of 1964, 5-6.

10. Eighteen states have published pre-employment inquiry guidelines which instruct an employer on lawful inquiries which can be made of a job applicant. All eighteen states prohibit discrimination on the basis of national origin, but allow an employer to ask whether the applicant is a United States citizen. The states are Arizona, California, Delaware, Hawaii, Indiana, Kansas, Massachusetts, Michigan, Minnesota, New Mexico, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Utah, Washington, and West Virginia. Only New Jersey prohibits any inquiry about citizenship. See 2 CCH Employment Prac. Guide ¶ 20,000ff.

Minnesota, one of the states following New York's lead, defines "national origin" in its State Act Against Discrimination as "the place of birth of an individual or any of his lineal ancestors."[11]

It is overwhelmingly clear that Farah's position is consistent with over thirty years of government hiring practice and accords with the interpretation adopted by a significant number of states which have adopted fair employment practices legislation and published pre-employment guidelines.

D. In light of the facts before it, the Court of Appeals correctly held inapplicable the EEOC guideline prohibiting discrimination on the basis of citizenship.

> The EEOC policy guideline provides:
> Because discrimination on the basis of citizenship has the effect of discriminating on the basis of national origin, a lawfully immigrated alien who is domiciled or residing in this country may not be discriminated against on the basis of his citizenship. . . . 29 C.F.R. § 1606.1(d) (1972).

In *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 434 (1971), this Court said that the EEOC interpretation of the Civil Rights Act was "entitled to great deference."[12] Both Farah and the Court of Appeals agree. But this Court went on to say, *"Since the Act and its legislative history support the Com-*

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11. 2 CCH Employment Prac. Guide ¶ 24,401, § 363.01 Minn. State Act Against Discrimination, Minn. Stat. (1969).

12. This Court has directed that similar deference be paid to Interpretative Bulletins issued by the Department of Labor regarding the Fair Labor Standards Act:

> "We consider that the rulings, interpretations and opinions of the Administrator under this Act while not controlling upon the courts by reason of their authority, to constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance."

Skidmore v. *Swift & Co.*, 323 U.S. 134, 140 (1944).

mission's construction, this affords good reason to treat the Guidelines as expressing the will of Congress." 401 U.S. at 434. (Emphasis added.) In the case at bar, however, neither the facts, the language of the Act, nor its legislative history support the EEOC guideline. *Duke Power* does not advocate blind adherence to EEOC guidelines,[13] but favors an analytical approach:

> What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment WHEN [not "because" as used in the EEOC guideline] the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification. 401 U.S. at 431. (Emphasis added.)

Thus *unless* a citizenship requirement in employment results in national origin discrimination, there is no unlawful act. It has been overwhelmingly shown *in this case* that Farah's preference for United States citizens has not resulted in discrimination against Cecilia Espinoza on the basis of her Mexican national origin. Consequently, the Court of Appeals correctly rejected application of the EEOC guideline in this instance.[14]

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13. The Court recognized the same limitation on the Department of Labor in *Skidmore* v. *Swift & Co.*, *supra*, where it held:

> "The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."

Where the Administrator's interpretations have not comported with these factors, the courts have not hesitated to reject them. See, *e.g.*, *Hodgson* v. *Generalized Servs., Inc.*, 457 F.2d 824 (4th Cir. 1972); *Lassiter* v. *Guy F. Atkinson Co.*, 176 F.2d 984 (9th Cir. 1949); *Wirtz* v. *Chesapeake Bay Frosted Foods Corp.*, 220 F.Supp. 586 (E.D. Va. 1963), *aff'd*, 336 F.2d 123 (4th Cir. 1964).

14. Espinoza filed her charge with the EEOC on August 11, 1969; the guideline in issue was not promulgated until January 13, 1970. In *Mitchell* v. *Hartford Steel Boiler Inspection & Ins. Co.*, 12 Wage & Hour Cas. 498, 501, 28 CCH Lab. Cas. ¶ 69,192

II.

The Court of Appeals decision does not in any way dilute the full complement of constitutional rights, privileges or guarantees enjoyed by aliens, including those embodied in the Fourteenth Amendment.

Graham v. *Richardson*, 403 U.S. 365, 372 (1971), clearly establishes that state classifications "based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny." Espinoza acknowledges that the state action cases, such as *Takahasi* v. *Fish & Game Comm'n*, 334 U.S. 410 (1948) and *Graham*, involve state statutes which were found to violate the equal protection clause of the Fourteenth Amendment. The "judicial solicitude" of *Graham*, appropriate in state action cases to protect constitutional rights and guarantees, is one thing; but the judicial contortion required to equate "national origin" with "citizenship" in a statutory construction case is quite another. Even the *Graham* Court spoke of separate classifications based on alienage, nationality, and race. To speak of both alienage and nationality (or citizenship and national origin, if you will) would be redundant unless the words have different meanings. Although discrimination on the basis of both classifications could have been proscribed by Congress, the Act speaks only of national origin, not citizenship. Furthermore, the *Graham* court indicates an interpretation of "nationality" (or national origin) consistent with Farah's. When speaking of nationality classification, the Court cited cases all of which involve discrimination on the basis of *ancestry*, not citizenship, 403 U.S. at 371 n.5. In short, the Court

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Footnote continued—
(D. Conn. 1955), *aff'd*, 235 F.2d 942 (2d Cir. 1956), *cert. denied*, 352 U.S. 941, the court accorded no weight whatsoever to an interpretation issued by the Department of Labor after the controversy that formed the basis of the litigation arose.

of Appeals decision is consistent with *Graham*, because it does not in any way dilute the full complement of constitutional rights, privileges or guarantees enjoyed by aliens, including those embodied in the Fourteenth Amendment.

CONCLUSION

Since Farah did not discriminate against Cecilia Espinoza because of any reason prohibited by Congress, the decision of the Court of Appeals is correct. The Petition for Writ of Certiorari should therefore be denied.

Respectfully submitted,

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CERTIFICATE

I hereby certify that on November 29, 1972, copies of the foregoing were mailed, postage prepaid, to Harriet Rabb and George Cooper, 435 West 116th Street, New York, New York 10027, and to Ruben Montemayor, 1414 Tower Life Building, San Antonio, Texas 78205, Attorneys for Petitioners. I further certify that all parties required to be served have been served.

WILLIAM DUNCAN